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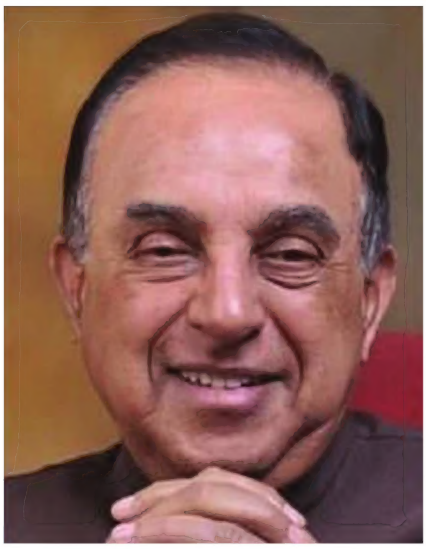

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Prof. Cora Hoexter on Administrative Law of South Africa

Prof. Michael Broyde on Law and Religion

Prof. Russell Sandberg on Law, Religion & Society

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EDITORIAL

The Rule of Law is a quintessence of the fact that there is no arbitrariness in law enforcement within a country. The citizens can go about planning their work knowing full well that there is certainty in law. There should be an established legal order in the country in which every citizen faithfully obeys the law. The constitution guarantees that all citizens are 'equal before the law' and must have the 'equal protection of the law'. Public law assures that all actions of the government - in controlling the polity - are within the framework of an established legal structure and the constitution being the supreme law of the country. Administrative law concerns the rules and regulations for public conduct but that must perforce be in conformity with the higher law of the country. Every order of the government must comply with that condition but citizens however can read between the lines and check the government if it transgresses upon the very fundamental values which it is bound to defend and uphold.

We posed some pertinent questions to Hon. Dr. Subramnian Swamy, a former Law and Justice Minister of India, who is better known as 'a rebel with a cause'. He is an anti-corruption crusader in India. He fearlessly takes the bull by the horns and has challenged the actions of 'all-powerful politicians' on graft issues at the Supreme Court of India. He has given his perspective on Public Interest Litigation- PIL in India.

Prof. Robert Natelson, Professor of Law (ret.) of the University of Montana and an accomplished constitutional law scholar and widely acknowledged being a leading scholar on the constitutional amendment procedure. He has touched on the U.S constitution and has given his detailed analysis on whether the American constitution deserves a revision or not. He strongly disagrees with the notion that American constitution is 'not in keeping with the requirements of society'.

We have spoken to Prof. Cora Hoexter of the University of Witwatersrand, the Author of *Administrative Law in South Africa* on the progressive constitutionalism in South Africa since the post-apartheid constitution was adopted. Her book has often been referred to by the South African judiciary on adjudicating administrative law disputes. She has provided an in-depth analysis of governance and the operation of public law in South Africa.

Prof. Michael Broyde, Professor of Law at the Emory University USA, has given his perspective on the law and religion. Being a Rabbi with an expertise in Jewish Law, he has brilliantly articulated his standpoint on law and religion.

We are pleased to produce this March 2022 issue and have included issues of concern to the Anglo-American world. We would be delighted to hear your feedback.

Srinath Fernando, LLM
Editor-In-Chief/ Publisher

The Anglo-American LAWYER

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An Appeal to the Deans of the American Law Schools

NATIONAL CONFERENCE ON THE REVIEW OF THE AMERICAN CONSTITUTION

The American constitution had remained stagnant for over 200 years. The American dream and the way of life has transcended far beyond what the framers had anticipated. The challenges America is facing today are formidable and wide ranging from terrorism, climate change, cyber security, nuclear attack, and the open defiance of the rule based behavior by some of the America's rivals in the international arena. There are multiple global challenges that are still evolving. The framers of the American constitution could not possibly have imagined the magnitude of the challenges America is confronting today. *The Anglo-American Lawyer* Magazine is calling for a national conference on the review of the American constitution to delve deep into the contours and intricacies of the constitutional provisions and on what impact it had in the past or could possibly have in the future on achieving the Great American Dream. We believe that the Congress must provide the Executive sufficient leeway to deal with global challenges and the immediate review of the War Powers Act to deal with America's archrivals – perhaps at hypersonic speed.

OVER TO THE DEANS OF THE AMERICAN LAW SCHOOLS.

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Hon. Dr. Subramanian Swamy on Public Interest Litigation

Dr. Subramanian Swamy is an Indian politician, economist and statistician, who serves as a nominated Member of Parliament in Rajya Sabha, the upper house of the Indian Parliament. Before joining politics, whe as a Professor of Mathematical Economics at the Indian Institute of Technology Delhi. He is known for his Hindu nationalist views. Swamy was a member of the Planning Commission of India and was a Cabinet Minister in the Chandra Shekhar Government. Between 1994 AND 1996 Dr. Swamy was Chairman of the Commission on Labour Standards and International Trade under former Prime Minister P.V. Narasimha Rao. Dr. Swamy was a long time member of the Janata Party of India, serving as its president until 2013 when he joined the Bharaatiya Janata Party (BJP). He has written extensively on foreign affairs of India dealing largely with China, Pakistan, Sri Lanka and Israel. He was nominated to Rajya Sabha on 26th April 2016

Dr. Swamy attended Hindu College, University of Delhi, from where he earned his bachelor's degree in Mathematics. He then took his masters degree in statistics from the Indian Statistical Institute Calcutta. He was later recommended by Hendrick S. Houthakker and went to study at Harvard University on a full Rockefeller scholarship, where he received his PhD in Economics in 1965, with his thesis titled Economic Growth and Income Distribution in a Developing Nation. His thesis was supervised by Nobel laureate Simon Kuznets. While he was a doctoral student at Harvard, he attended MIT as a cross-registered student and later worked at the United Nations Secretariat in New York as an Asst. Economics Affairs Officer in 1963. He subsequently worked as a resident tutor at Lowell House at Harvard University. A full profile of Dr. Swamy could be had from https://en.wikipedia.org/wiki/Subramanian_Swamy

The AAL Magazine; *Dr. Subramanian Swamy, let me at the very outset thank you for having consented to this interview despite many demands of you in the biggest democracy in the World - that is India. You have held Ministerial positions as Law and Justice Minister and Minister of Commerce. I really don't know how to describe you Sir, because you wear many hats. You are a Harvard University educated Economist, a Politician, a Parliamentarian, a Party leader, an anti-corruption crusader and Public Interest Litigant with many successes at taking corrupt politicians to the task. You have in fact fought for the concerns of the marginalizedand downtrodden who deserve equal distribution of resources. Your fight was with those who plundered India. You are also known as a fearless politician. Could you tell us something about your involvement in fighting corruption through Public Interest Litigation PIL by moving the Supreme Court of India?*

Dr. Swamy: You can call me as a rebel with a cause.

The AAL Magazine;*How do you see the evolution of PIL in India from the time the first case was filed and whether you have seen any specific features of judicial innovation. Do you see a progression in the attitude of the Supreme Courts compared to what you had seen 20 years or so ago?*

Dr. Swamy: PILs caused a mental revolution in that ordinary people could get to prosecute those in high places in authority who had stolen public assets or were complicit in the corrupt acts of others. It also enabled ordinary people to get the law enforced.

The AAL Magazine;*Do you think PIL activism has to a great extent curtailed the temptation by corrupt politicians to plunger the countries resources. Have the PIL cases been a solid deterrent to corruption in India.*

Dr. Swamy: The effectiveness depends on the incorruptibility of judges. Social revolt against purchased judgments and especially possibilities of that is a deterrent.

The AAL Magazine;Sir, *if I may digress from PILs to the more core issues of the Constitution of India. It has been almost 70 years since India promulgated a Constitution. Do you see that the Constitution of India needs further reforms in keeping with the needs of the time or do you see that it was the Constitution that held India together?*

Dr. Swamy: No. Amendments of Articles can take place occasionally

The AAL Magazine;*You have spent a fair amount of time in the United States, having taught at the Harvard University and you have been exposed to various facets of the American way of life and development of the U.S Constitutional law. Sir our Magazine has called for a National Conference on the Review of the American Constitution. How do you see America today and whether the American Constitution is a hindrance to expanding American political values. Should the American constitution be subject to further review in order to deal with or confront current global challenges in terms of competing on equal footing with other countries and global threats such as terrorism and demanding rule-based behavior from America's archrivals?*

Dr. Swamy: That is a undocumented sweeping demand of whole review. US hasenormous capacity for self-cure. They do not require my opinion.

The AAL Magazine;*Do you see a need for an Executive Presidential constitutional model in India where a more powerful Executive President could deal with national security, social and economic issues more effectively.*

Dr. Swamy: Indian especially Hindu culture is based on consensus in decision making. Foreign invasion of brutal Islam and British Imperialist brain washing and exploitation has weakened that culture. But we are headed for a renaissance.

The AAL Magazine;*Sir the central theme of our Magazine is to promote and nurture the Anglo-American legal tradition. You have in India a constitutional law doctrine called the Doctrine of Eclipse where the laws introduced prior the promulgation of the Constitution of India can be struck down to the extent of its repugnancy. What is the extent of the influence of British legal tradition in India since the promulgation of the Constitution of India? Where do you see primacy to British Common law tradition within the bounds of Indian law?*

Dr. Swamy: We are more conservative about change than even the British in their own country. But we started well with magnificent Constitution in which we have already amended its Articles through parliament about a 125 times in 70+ years. But the Supreme Court by framing the concept of Basic Structure has insured that India will legally never slide into dictatorship by reckless amendments.

The AAL Magazine; *As you know Sir there have been several issues facing the federal states and economic progression has been very lethargic in some of the backward regions. When it comes to law and order there have been ample precedents, the Central Government takes control over the state. What would be situation if a particular state is unable to perform in terms of developing the state, could the Central Government intervene and take control of the state? Would it not be more beneficial for the people?*

Dr. Swamy: Only if the Constitution is not respected, as was the case when DMK Government in 1990-91 did with by giving a free run to the LTTE, did we [when I was Union Minister for Law and Justice] dismiss the government and then held fresh elections. In the elections DMK won only 2 seats of the 234 Assembly seats thus the people vindicating our action. It should be remembered that Indian Constitution is not Federal but Unitary with subsidiary federal provisions in the Constitution. No state can secede from the Indian nation as per Article 1 of the Constitution. However, we can add more states as we did with Sikkim.

Prof. Robert Natelson on Constitutional Law

Robert G. Natelson is one of America's best-known constitutional scholars. For 23 years, he served as Professor of Law at the University of Montana, where he taught Constitutional Law and became a recognized national expert on the framing and adoption of the United States Constitution. He pioneered the use of source material, such as important Founding-Era law books, overlooked by other writers, and he has been the first to uncover key facts about some of the most significant parts of the Constitution. Prof Natelson has written for some of the most prestigious academic publishers, including Cambridge University Press, the *Harvard Journal of Law and Public Policy*, and *Texas Law Review*. In addition to his discoveries in U.S. Constitutional law, he has achieved other significant "firsts:" His webpage, The Scholarship of the Original Understanding of the Constitution was the first online guide to "originalist" research. For the University of Montana, he created the Documentary History of the Ratification of the Montana Constitution, the first organized collection (either on-line or in print) of materials explaining the 1972 Montana Constitution to the ratifiers just before they voted on it.In conjunction with his eldest daughter Rebecca, he edited and posted the first complete Internet versions of the Emperor Justinian's great Roman law collection (in Latin).

There are several keys to Professor Natelson's success as a scholar. Unlike most constitutional writers, he has academic training not merely in law or in history, but in both, as well as in the Latin classics that were the mainstay of Founding-Era education. He works hard to keep his historical investigations objective. Most critical, however, have been lessons and habits learned in the "real world:" Before his academic career began, Prof. Natelson practiced law in two states, ran two separate businesses, and served as a regular real estate law columnist for the *Rocky Mountain News*. Later, he created and hosted Montana's first statewide commercial radio talk show and became Montana's best known political activist -- leading, among other campaigns -- the most successful petition referendum drive in the history of the state. He also helped push through several important pieces of Montana legislation, and in June 2000, was the runner-up among five candidates in the party primaries for Governor of Montana. For recreation, he spends time in the great outdoors, where he particularly enjoys hiking and skiing with his wife and three daughters. (*Source; The Federalist Society*)

The AAL Magazine: Professor Natelson, you have had very impressive academic credentials after having taught constitutional law for 25 years or so. I understand that you have in your research discovered some rare law books during the time the discourse on American constitutional experiment had begun which was almost 200 years back. Could you tell us what it is and how you found them and what impact it had on your research?

Prof. Natelson: In the early 2000s, I began to pay serious attention to reports of English court decisions. Those reports weren't exactly rare, because *English Reports* is a common holding in good American law libraries (and today they are online as well). But relatively few constitutional scholars were using them. My discovery of the original meaning of the Necessary and Proper Clause was due partly to studying English cases and partly to a day spent in the Rare Book Room of the University of Pennsylvania Law Library.Then for four months in 2005 I worked in the libraries of Oxford University and the Middle Temple, the Inn of Court at which some leading American Founders had studied. Seeing and handling hard copy made me familiar with the corpus of Anglo-American law, including the meaning of citations in early American constitutional cases, such as *McCulloch v. Maryland* (1819). This also enabled me to make better use of legal and literary material available in databases such as *Eighteenth Century Collections Online*. A trip to Colonial Williamsburg resulted in my

stumbling on one of the first law books published in America, George Webb's *The Office and Authority of the Justice of the Peace*, published in Williamsburg in 1736.It cannot be overstated how much the language of our Constitution depends on 18th-century Anglo-American law. Most of the leading Founders were lawyers and those who were not usually were fairly well versed in the subject. And their law was, fundamentally, English law. It also would be difficult to overstate how much the ratification debates and other contemporaneous commentaries on the Constitution owe to literature popular at the time, both English works and the Greco-Roman classical canon.Yet modern constitutional commentary tends to be dominated by law professors, who lack training in history, 18th century literature, the Greco-Roman classics, and even the relevant legal topics. That's one reason so much constitutional commentary today is simply politically-driven manipulation.

The AAL Magazine: Professor, the American Constitution is now almost 200 years over, it is certainly not in keeping with the requirements of the society. Do you think it is high time the American polity began to reflect deeply on a new constitution that would reflect the needs of the society?

Prof. Natelson: I disagree that the Constitution is "not in keeping with the requirements of society." To explain:The usual basis for critiques of the Constitution is its limits on federal authority and its system of checks and balances. But in my view, limited government and checks and balances are never out of date. In fact, the complexity of modern society renders central control more problematic than ever, as the collapse of the U.S.S.R. illustrated. So also do the many studies finding correlations between economic prosperity and levels of freedom—"freedom" being another way of saying the law doesn't regulate an activity beyond a basic minimum.One reason for this sort of critique, I think, is that most commentators on the Constitution are lawyers, and lawyers, like people in other professions, tend to exaggerate the importance and efficacy of their own subject. The truth is, however, that beyond a certain baseline, law is not a very good way to organize most human activities. The "spontaneous order" that arises outside of law usually does a better job.Another reason for some criticisms is ignorance of what constitutional terms really mean. For example, despite all the rhetoric about how "flexible" some constitutional provisions are (especially ones that really are not that flexible) there is often a failure to recognize that other provisions are flexible indeed. Examples are the Equal Protection Clause and the Suspension Clause.Still another reason is ignorance of the purposes or values constitutional provisions serve. In my experience, much of the criticism of the Electoral College is fed by ignorance of all the values that went into its construction and the excruciatingly difficult, and generally successful, process of balancing them.Still another basis for criticism comes from blaming the Constitution for problems that arise largely from failure to enforce the Constitution. There are recurrent articles in the popular press blaming the Constitution for such problems as runaway debt, divisiveness in American government, politicization of the courts, and so forth---written by people clueless to the fact that many of those problems are caused largely by the federal government's disregarding the Constitution, especially by operating far beyond the range of responsibility the Constitution gives it.That having been said, I think changes in conditions do call for some constitutional amendments. Changes in life expectancy since the Founding, for example, argue for extending term limits

from the President to include judges, Congress, and other officials. I also think we need an amendment or two to squeeze the federal genie back into its constitutional bottle.

The AAL Magazine: Do you think the need is exacerbated by the threats America is confronting today especially on the surprise nuclear attack, cyber-attacks which can devastate the American economy, or the evolution of hypersonic missiles where The Executive can no longer wait for the legislature to authorize war or Do you think there must be a holistic approach to War Powers Act. Should the President be authorized the use the counter measures to defend American well in advance. I mean the pre-made decision must be stored electronically to deliver a counter measure. How lawful is the decision to wage war against America's archenemies are perhaps at war with American already?

Prof. Natelson: Under a proper understanding of the Constitution, there is no need for a declaration of war to prepare for an attack or to respond to one. The Founders intended declarations of war to be used primarily to justify offensive operations under international law. Defense from attack is authorized by the Constitution's Guarantee Clause and some of the document's other provisions.

The AAL Magazine: Professor, the American Government is manipulated by the organized groups such special interest groups and corporate lobbies working for the advancement of their own causes often at the cost of the general public. This has a direct bearing on the vast majority of people who have expectations to uplift their social status within a liberal society. The corporate lobby is dictating terms or influencing policy at the helm of American Government. How has this impacted on the very values the American Constitution tries to uphold?

Prof. Natelson: Lobbies and special interest groups are a feature of any free society, but their extent today is an excellent example of a problem caused by disregarding the federal government's constitutional limits. If, for example, health care were recognized as outside the federal sphere (as Chief Justice John Marshall insisted it was in Gibbons v. Ogden), then Congress and federal officials would not be plagued with health industry lobbyists. All the states are wealthy enough and otherwise fully capable of overseeing their own health care systems. The same is true of many other activities that were considered outside federal responsibility until the Supreme Court disabled most restraints on federal power during the period 1937-1944.This reminds me of the debate over campaign finance and "money in politics." The best way to get money out of politics—in fact, probably the only real way—is to take politics away from control over money. By this I don't mean the federal government shouldn't control the currency. I mean the federal government's control over economic activity should be more modest than it is now.

The AAL Magazine: As you are aware certain functions of the Government clearly belong to the federal government, the state government and local government. For example, the National Security and Foreign Policy issues are clearly a federal matter. The Constitution is clear on the demarcation of the functions of the American State. How do you see the perfect balance between Executive, Legislature and the Judiciary in terms of the evolution of the American Government over two centuries? Do you think the Separation of Powers that was envisaged at the time of drafting the Constitution and the current set up of the American Government produces a perfect

balance? Should the whole gamut of issues concerning the Separation of Powers doctrine must be looked afresh to ensure that it is working perfectly? What I mean is the policy issues are too complex for Judiciary to intervene and strike down legislation which goes against the public policy.

Prof. Natelson: This is a very difficult question to answer. First, the demarcation is not always quite as clear as you suggest. Take foreign policy as an example. Under the Constitution, the federal government is supreme in that realm, but the states still have some residual authority. For example, discussion at the Constitutional Convention recognized that states could, unless contradicted by Congress, impose embargoes on goods from foreign nations.As for separation of powers: Despite what the text books tell us, this is really not a foundational principle in our Constitution. That's why the Constitution so often violates it—by, for example, allowing the Senate to reject presidential executive nominations and allowing the House the judicial function of impeachment. The foundational principle is *decisional independence*—not independence from the people, but independence from undue pressure from other branches of government. When separation of powers furthers independence, the Constitution establishes it. When separation would undermine another branch's independence, the Constitution disregards it. A good example is the President's veto: It's really a legislative power, but one reason the framers deemed it necessary was to protect the independence of the executive branch.I think we have to understand what the foundational principles are before we address derivative issues such as separation of powers.

The AAL Magazine: Professor, if I may venture into a specific case on the State of Arizona's efforts to control immigration was met with resistance from the Federal Government. The case I am referring to is the *Arizona v. United States* in which the Supreme Court struck down the Arizona laws prohibiting illegal immigrants to stay in Arizona and criminalized the illegal immigrants to live in Arizona and secure temporary work etc and many citizens have found this piece of legislation as being too rigid and that it went against the sense of humanitarianism and human rights. Do you think that immigration – though a federal subject – must be a policy issue that concerns the all states of the United States hence it has a direct bearing on the Federal Constitution? Do you think at the time of drafting the American Constitution this aspect has not been adequately addressed hence a new ethos is required?

Prof. Natelson: Although some libertarian commentators have recently denied it, you are correct that the Constitution gives jurisdiction on the subject to the federal government. Specifically, it is covered—not, as the Supreme Court said in Arizona v. US.—by Congress's naturalization power but by its power to "define and punish . . . Offenses against the Law of Nations." The law of nations, as the term was used during the Founding Era, included issues of immigration and emigration. (This is an example of how 18th-century law books can clarify an issue.)This is one of those areas, however, in which a residual, although subordinate, power was left in the states. Determining whether a state has acted properly is a process of identifying federal law on the subject (if any) and then deciding whether the state action conflicts with federal law. If it does conflict, then the court applies the pre-emption doctrine.This is a technical legal process, and without examining the matter in detail, I'm not going to second guess the Supreme Court's decision in the *Arizona* case.

Prof. Cora Hoexter on Administrative Law of South Africa

Cora Hoexter BA LLB (Natal) MA (Oxon) PhD (Witwatersrand) is a Professor of Law at the University of the Witwatersrand, Johannesburg, currently on a 50% contract. She has a rating of B1 from South Africa's National Research Foundation. Prof Hoexter's publications on administrative law have frequently been cited by the superior courts of South Africa, including the Constitutional Court. Her books include a leading scholarly text, *Administrative Law in South Africa,* first published by Juta in 2007. A third edition, co-authored with Dr Glenn Penfold, appeared in October 2021. Her recent work includes a chapter on 'Administrative Justice and Codification' in the forthcoming *Oxford Handbook of Administrative Justice.* She has been a 'foreign correspondent' for *De Smith's Judicial Review* since 2007.

Cora Hoexter's contributions on the judiciary include a chapter on non-judicial functions in HP Lee (ed) *Judiciaries in Comparative Perspective* (CUP, 2011), an edited book with Prof Morné Olivier entitled *The Judiciary in South Africa* (Juta, 2014), an article on lawfare with Prof Hugh Corder in (2017) 10 *African Journal of Legal Studies,* and a chapter on South Africa's Judicial Service Commission in Graham Gee & Erika Rackley (eds) *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018). She has recently published a book review of Richard Devlin & Sheila Wildeman (eds) *Disciplining Judges* (2021).A former member of the South African Law Reform Commission, Prof Hoexter has been an editor of the *South African Law Journal* and the *Constitutional Court Review,* and she was Editor-in-Chief of the *Annual Survey of South African Law* for several years. She is on the editorial board of *Cambridge Studies in Constitutional Law* and on the advisory board of the Centre for Rights and Justice at the Chinese University of Hong Kong. She is a founding member of the Symposium on Public Law in Four Jurisdictions and has served on the advisory board of the biennial Public Law Conference since 2015.

The AAL Magazine: Thank you, Professor, for having granted us an interview. Our mandate is to promote Anglo-American legal heritage. South Africa(or what became South Africa) was a British colony for many years, and many principles of English law are still recognized.But since 1994,South Africa has undergone a tremendous transition to democracy, initially under the 'interim' Constitution of 1993 and subsequently under the 'final' Constitution of 1996.As someone who has written extensively on South African public law and especially administrative law, how do you see this transition in terms of the development of public law? Which areas have seen the greatest changes?

Prof. Hoexter: Disciplines acknowledged to fall under public law, such as constitutional and administrative law as well as criminal law and procedure, have of course seen remarkable change and development since the introduction of constitutional democracy in 1994. But in truth, no aspect of South African law has been left unaffected by our constitutional revolution. The supreme democratic Constitution, with its founding values, itsextensive Bill of Rights and its broad provision for standing and remedies,has penetratedand 'constitutionalized' what are traditionally regarded as areas of private law, such as property law, family law, contract and delict (the Roman lawname we South Africans still employ for tort).In that sense, public

law has virtually subsumed the rest of the legal system.

It is difficult to say where the greatest changes have taken placesince 1994 because so much depends on one's particular criteria. Progressive legislation has been enacted in a numberof areas, from equality (the Promotion of Equality and Prevention of Unfair Discrimination Act4 of 2000) and access to information (the Promotion of Access to Information Act 2 of 2000) to same-sex marriage (the Civil Union Act 17 of 2006) and consumer protection (the Consumer Protection Act 68 of 2008).In terms of case law, the vibrant jurisprudence produced by the Constitutional Court in the field of socio-economic rights (sections 26 and 27 of the Constitution) is especiallyfamous in the rest of the world.At the level of discipline, however, one might want to focus on those whose development has been fuelled by the twin processes of constitutionalization and codification.For example, administrativelawnow has a constitutional basis in the rights to just administrative action (section 33)but, pursuant to a constitutional mandate, administrative-law review is governed most immediately by a statute, the Promotion of Administrative Justice Act 3 of 2000 (PAJA).Equality and non-discrimination law has seen great development for similar reasons. One can say the same about employment law, though its codification was not constitutionally obligatory.

The AAL Magazine: Professor, what is your take on post-apartheid constitutionalism in South Africa overall? Is the democratic 1996 Constitution a true reflection of the current situation in South Africa, and has it succeeded in eliminating the discrimination associated with the apartheid era?

Prof. Hoexter: While progress is being made, the sad reality is that there remains a considerable gulf between the aspirations of the democratic Constitution and the daily lives of most South Africans.Notwithstanding the Constitution's promise of equality(section 9), this country is persistently one of the most unequal societies in the world in economic terms, and black South Africans remain the most disadvantaged.Land reform has proceeded at a worryingly slow pace and unemployment is now at unprecedented levels, especially amongst the young: some put the figure for youth unemployment as high as 75%. Again, constitutionally and legally speaking, the system of apartheid is dead; but in practice, segregation and discrimination are still alive in some ways. For example, our cities and towns are still largely divided, broadlyalong racial lines, intoleafy suburbsand poor areas that tend to suffer more crime and less reliable service delivery.

These problems and tensions, exacerbated in recent years by repeatedfailures of governanceas well as public corruption, lootingand state capture, are obviously a serious threat to constitutionalism. Many young South Africansmay not be able to see the point of a democratic Constitution that does not appear to do them any material good.

The AAL Magazine: As you are aware, in *President of the RSA v SARFU* the Constitutional Court of South Africa held that the administration is the part of

government that is predominantly concerned with the implementation of legislation. How effective is the public administration in delivering administrative justice?Have less privileged South Africans benefited from South Africa's reformed administrative law?

Prof. Hoexter: The reform of administrative law has been overwhelmingly beneficial. But, while there are undoubtedly pockets of administrative excellence, there are also gaps between the theory and the reality of public administration in South Africa today. Section 33 of the Constitution promises 'just administrative action' and section 195, which governs the administration, is full of inspiring values such as impartiality,efficiency and responsiveness.However, the record of administrative decision-making that emerges from the law reports tends to be less inspiring.

Many administrators are deployees of the majority party, the African National Congress (ANC). Some of these lack the skills required to do their jobs, while others are seemingly more interested in self-enrichment than inperforming their official duties.The effect on service delivery and on the transformative constitutional project more generally has been disastrous. Far too often 'public officialsseem not to understand the integral role they play our constitutional state', as the Constitutional Court lamented in *Nyathi v MEC for Department of Health, Gauteng*.

Less privileged South Africans are of course most gravely affected by such failures, particularly since judicial review remains the most reliable safeguard in the administrative system. In other words, the achievement of administrative justice in a particular instance may well depend on going to court – a luxury few can afford.Access to administrative justice is still one of our greatest challenges.

The AAL Magazine: In *Bato Star Fishing v Minister of Environmental Affairs*, Justice O'Regan articulated that the courts' power to review administrative action is no longer anchored in the common law but rather in the Constitution itself. She also said the *grundnorm* of administrative law is found not in the doctrine of *ultra vires*, nor in that of parliamentary sovereignty, nor in the common law, but rather in the principles of the supreme Constitution.Was this not a radical departure from the way administrative decisions hadpreviously been treated by the South Africancourts?

Prof. Hoexter: It certainly was. In the pre-democratic era, judicial review of administrative conduct was a matter of common law. It was performed on the basis of grounds of review inherited from English law and was justified by the *ultra vires* doctrine. However, it was also constrained by parliamentary sovereignty: the legislature was free to authoriseconduct that might otherwise have been struck down as unreasonable or unfair.

After 1994, administrative-law review became a constitutional matter by virtue of the rights to just administrative action, which in turn have been given effect to by the PAJA. Parliamentary sovereignty has given way to constitutional supremacy, and judicial review no longer depends on *ultra*

vires. Instead, the review of administrative action is justified by section 33 of the supreme Constitution, and by the rule of law (a founding value) in respect of exercises of public power not amounting to administrative action. That said, the common law has not lost its relevance. It still governs the review of exercises of *private* power, and it is still capable of informing the interpretation of section 33 and of the PAJA; for example, the pre-1994 case law remains useful on topics ranging from delegation to legitimate expectations.However, as O'Regan J made clear in *Bato Star*, the common law answers to the Constitution – like everything else.

I may add that while all these fundamentals are now firmly established, the full implications of constitutional supremacy were not so well understoodat the start of the democratic era. For a few years the courts distinguished between two parallel systems of administrative-law review, each governed by its own distinct rules and requirements: the familiar old common-law system and the new constitutional system. The Constitutional Court famously rejected this duality in the *Pharmaceutical Manufacturers Association*case of 2000, where it explained that there is only *one* system of law and that it is entirely governed by the supreme Constitution.Those important statements in *Bato Star*flowed from and elaborated on this crucial proposition.

The AAL Magazine: There have been progressive dicta by the Constitutional Court holding that administrators must recognize international conventions such as UDHR whenever they are relevant to the functions of an administrative authority. One classic case is *S v Makwanyane*. What is the extent of the clash between municipal law and international law in South Africa, and is it an impediment to the achievement of administrative justice?

Prof. Hoexter: The 1996 Constitution is notably friendly to international law in a number of ways. For example,the courts are obliged by section 39(1) to take international law into account when interpreting the Bill of Rights, and section 233 instructs every court to'prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.Clashes between municipal law and international law are quiterare. Problems affecting the achievement of administrative justice are more likely to be the product of the misunderstanding or misapplication of international law by the official or officials concerned. Such errors are not unknown: a notorious example (though it impacted on criminalrather than administrative justice)istheSouth African government'sfailure to arrest Sudanese President Omar al Bashir when he attended a meeting of the African Union here in 2015.

The AAL Magazine: Professor, could you comment on the reception of EU or comparativejurisprudence in dispensing administrative justice in South Africa?

Prof. Hoexter: The South African courts have a strong comparative tradition. From 1910, when the Union of South Africa was created, the courts readily looked to other Commonwealth jurisdictionsas well as to

European countries such as Germany.The tradition continues today under section 39(1) of the 1996 Constitution, which facilitates but does not require the consideration of foreign law when the Bill of Rights is being interpreted.

In administrative lawthe case law on proportionality is one example of influencefrom the EU, but theUK remains the dominant source of comparative jurisprudence. That is unsurprising, since South Africa inherited its common-law principles of administrative law from English law.What is perhaps more surprising is the extent to which English case law is still relied on today. After all, the South African law has been thoroughly reshaped by means of constitutionalization and codification, and contemporary English law has had the status of foreign law for the last 70 years. But, as I suggested recently in a chapter on the indigenization of judicial review, the old connection with English law may simply be too strong and too deep to be severed completely.

The AAL Magazine: One intractable issue facing the Judiciary is the definition of 'administrative action' and 'executive action'. How do you compare the concept of 'administrative action' as understood in the UK and in South Africa? What makes the South African interpretation unique?

Prof. Hoexter: The South African concept of administrative action is unique to the extent that it is elaborately defined in a statute, the PAJA. This means that our courts necessarily grapple with the elements of the definition, every one of which must be satisfied in order for the relevant conduct to amount to administrative action. To qualify,conduct must be (1) a decision of an administrative nature(2) made by an organ of state or another person (3) exercising a public power or performing a public function (4) in terms of legislation or an empowering provision (5) that adversely affects rights, (6) has a direct, external legal effect and (7) does not fall within any of the listed exclusions.This is truly a 'palisade of qualifications', as one judge memorably described the PAJA definition.However, the courts have chipped away at this palisade over the years by means of creative interpretation. For example, today it is enough if the relevant conduct has the *capacity* to affect rights adversely. The rights need not be existing rights, either, and the adverse effect need not be on the applicant.

The line between administrative and executive action(which is one of the exclusionslisted in the PAJA definition) is as slippery in South Africa as it is anywhere else.As in many Anglo-American jurisdictions, in drawing the line our courts apply a range of factors rather than any one formula.The judicial tendency in recent years has been notably deferential, and this is probably because of the ready availability of the principle of legality (part of the rule of law) as an alternative avenue to judicial review. Because 'legality review' is capable of coming to the rescue, and because its grounds of review have expanded so much, the diagnosis of administrative action no longer matters as much as it used to.

Prof. Michael Broyde on Law and Religion

Michael J. Broyde is professor of law at Emory University School of Law, the director of the SJD Program, and Berman Projects Director at the Center for the Study of Law and Religion at Emory University. He is a product of New York University School of Law, JD 1988; Yeshiva University: Rabbi Isaac Elchanan Theological Seminary, Ordination 1991; Yeshiva University: and from Yeshiva College, BA, cum laude 1984.He is also a core faculty member at the Tam Institute of Jewish Studies at Emory. His most recent books are *Setting the Table: An Introduction to the Jurisprudence of Rabbi Yechiel Mikhel Epstein's Arukh HaShulhan* (Academic Studies Press, 2021, co-authored with Shlomo Pill of the Center for the Study of Law and Religion), *Sex in the Garden: Consensual Encounters Gone Bad in Genesis* (Wifpf& Stock, 2019), *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West* (Oxford Press, 2017) and *A Concise Code of Jewish Law for Converts* (Urim, 2017). He has written or edited thirteen books -- his next two books hopefully will be (1) *Splitting Hairs: The History, Law, and Future of Jewish Laws of Modesty and Women's Head Covering* (ben Yehuda Press) and (2) *Jewish Law and International Law: Sovereignty and Exogenous Authority in a Trans-national World (Oxford, 2022).*

Broyde is ordained (*yorehyorehve-yadinyadin*) as a rabbi by Yeshiva University and was a member (*dayan*) of the Beth Din of America, the largest Jewish law court in America, where he once served as director while on leave from Emory. He was the Founding Rabbi of the Young Israel synagogue in Atlanta, a founder of the Atlanta Torah MiTzionkollel study program. He served on boards of many schools and organizations in Atlanta, including more than 15 years as the chair of the medical ethics committee of Weinstein Hospice in Atlanta. Besides Stanford and Hebrew University, Broyde has been a visiting professor at many other places, most recently the University of Warsaw Law School in Poland and in the Interdisciplinary College of Law in Herzliya, Israel. He received a juris doctor from New York University and published a note on its law review. He also clerked for Judge Leonard I. Garth of the United States Court of Appeals for the Third Circuit.

The AAL Magazine; Professor, you have had a distinguished academic career and have authored around 200 literary works. You have also been a legal practitioner and had a stint at the U.S Courts of Appeals as a clerk. You are also a Professor of Law and a practicing Jewish Rabbi. Your exposure being a legal scholar and a religious leader must have given you a ring side view of how legal, social, religious and ethical issues intertwine in the society. It is indeed an opportunity to have a first-hand account of the clash of values in front of the blind Lady Justice where one's emotions are not counted when it comes to dispensing justice. What exactly is justice in terms of Jewish theological reasoning and in general?

Prof. Broyde;The Jewish tradition has two models of law between people when there is a dispute – law and compromise -- and while compromise is preferred, the Jewish tradition recognizes that compromise can only be mandated when the parties consent to court imposed compromise. Of course, Jewish law – halacha (literally, the path) – also recognizes

that law is just one of the parts of justice, and that good and proper people frequently are called upon to conduct themselves beyond the letter of the law. Charity – the voluntary giving to help the poor is a classical example of that. When compelled, it is taxation and not charity. Jewish law wants one to choose to give.

The idea that people who are forced to be good – Justice Holmes's 'bad man' rule – are less good than people who choose to be good is extremely important to the Jewish tradition. In this way, Jewish law has both a 'good person's rule and a 'bad man' rule at the same time. Jewish law scholars advise people all the time how to be the best that they can be, and not only what is so wrong so as to be prohibited.

The AAL Magazine; When you were teaching law at Emory University what sort of hurdles impediments did you come across being a Professor of Law and a practicing Rabbi. What I mean is whether your religion had any impact on the teaching you were supposed to undertake within the U.S constitutional context. Did you have to teach something which went against your own religion and whether it had clashed with your own religious values or academic freedom.

Prof. Broyde;Emory University and particularly its Center for the Study of Law and Religion has been a wonderful place to work. Never has the university created tensions between my faith and my job. I teach things that 'clash' with the values of my faith all the time, actually and I think that is important to do. I teach the law as it is, and not the law as I think it should be. That is the job of a law professor. I suspect that all academics in law school do not merely teach what the law should be in their view – we must teach out students what the law 'is.' That 'clash' is intellectually valuable and it is one of the advantages of teaching in a secular institution – one in which people are not compelled to share each other's theological or legal axioms.

Students challenge my view all the time. The Talmud (Taanit 7a) notes a great rabbi used to aver that He learned much from his teachers, more from his friends and the most from his student" and this is because excellent students challenge one's world view in a constructive way. Echo chambers are rarely places of innovation or even of interest. Precisely because there is no legally enforced religious truth in America, the truth is more likely to be found.

The AAL Magazine;How do you see the practice of religion under U.S constitutional frame work for other religions such as Judaism, Islam and other religions. Do you think there is sufficient freedom to engage in religious activities in the Unites States?

Prof. Broyde;The United States is uniquely rare in that we embrace both free exercise and disestablishment – unlike England, we have no State church and unlike France, we have no mandatory secularism. This is much rarer than we think and it is the blessing of American religious freedom. I think there is sufficient freedom of faith in America and the American model of competing dual freedoms is very powerful for the faithful and the disbeliever as well.

The First Freedoms – Speech, Association, Press, Disestablishment and Religious Practice – have in total greatly contributed to the unique American culture of individual freedom, which – for better and for worse – is deeply engrained in the culture of America.

The AAL Magazine;As you are aware many U.S states created public school systems, and children's moral development was viewed as a necessary corollary of education. There have been both proponents and opponents that public schools should not teach particular doctrines but instead they advocated Bible

study to cultivate morals based in what they thought were generally held Christian principles. Does this make any sense to you from your Jewish theological perspective?

Prof. Broyde;The purpose of the public school system is to provide a base education and – somehow related to that – is to establish a benchmark of the type of secular education that the many different private schools – parochial and not – need to provide. Members of minority faiths are entitled to have a public school system that does not indoctrinate their children against the faith of the parents, even as the public is deeply entitled not to have a public school system that is part of the community of the faithful. Developing suitable moral judgment is part of the mission of a public school, but that suitable judgement needs to be not parochial or violative of the duty for the secular government not to establish the truth of a particular faith.

The AAL Magazine;Do you think the Constitution of the United States has outlived its utility and do you think a fresh initiative must be made to review the Constitution.

Prof. Broyde;This is an exceedingly hard question and is not a binary one: The United States Constitution as an amendment process – which has been used numerous times – exactly because neither the Founders nor any generation after it thought that the document was perfect or unchangeable. Indeed, honesty requires us to recognize that the Constitution was founded on the bedrock of slavery being legal and only through the Amendment process was that moral wrong corrected.Change is part of law – even Jewish law – and changing conditions requires changing legal rules, sometimes. The Jewish tradition was in its Talmudic iteration 2000 years ago polygamous and now it is not. The real question is not whether change is needed in Constitutional law in America, but "what change is needed"?

The AAL Magazine;Which provisions of the Constitution do you think should be revisited or revised in order to secure a better cohesion and tolerance among various cultures and religions in the U.S. Can you articular an ideal provision in the constitution which would ensure religious freedom to all.

Prof. Broyde;I think that the basic model in America which insures both that government does not establish itself as endorsing or beholden to a specific faith, while simultaneously insuring that all have the freedom to worship as they see fit, is the right fit for the religiously and culturally diverse United States. Congress needs to work harder statutorily to insure that both of these ideals are regularly manifest. The United States is not a nation with a single dominant denomination and – really! – never has been. Nor is it a nation racked by religious tensions or warfare based on faith. Thus it does not need French Laïcité or English establishmentarianism. Greater effort to insure that every faith and community has the space to flourish is needed, but that is hardly a recasting of the foundational rules.

The AAL Magazine;Let me now move on to LGBT rights under U.S constitution. Professor as you are aware LGBT rights have evolved significantly over time. There have been successes by LGBT Americans that they had won the right to marry in all 50 states. There have been instances where LGBT Americans had been explicitly protected from discrimination in employment, housing, and access to public accommodation. How do you see LGBT rights under U.S constitution and how does this square with a pluralistic society like United States. Should the American society be more tolerant towards LGBT rights?

Prof. Broyde;I think that the government needs to work solidly all the time to insure that people are not discriminated against in a variety of ways and diverse settings. I actually favor the New York rule which does not allow an employer to consider any conduct unrelated to employment in making hiring

and firing decisions. America was founded on the deep libertarian tolerance of the other – and the list of 'others' should continue to grow and expand. Society does not lose by expanding the rights given to others, so long as the government works hard to insure that people do not use their rights to oppress others. At the margins, sometimes rights infringe on others, but centrally expansive personal rights increase freedom and diminish tension. Exactly because religious controversy in America cannot turn into winner take all controversies – since our legal system never allows winners to take all in religious matters and establish themselves within the legal system – there is much more freedom and tolerance.

Of course, as the Supreme Court sometime reminds us (see for example both *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) and *Espinoza v. Montana Department of Revenue* (2020)), neutrality in funding matters requires that the government truly be neutral and not engage in economic discrimination against the faithful. But, that does not mean that government can favor religion either.

The AAL Magazine; In *Lawrence v Texas* 203 Case, Justice Kennedy delivered an opinion which says that due process clause of the fourteenth amendment grants the full right to engage in private conduct without government intervention. The crux of the issue was that public ideas about morality cannot justify infringing the peoples constitutional rights. How would you justify this statement under U.S constitution and how does this impact on the theological aspects of Judaism.

Prof. Broyde;Broadly speaking, I think Jewish morality does not seek endorsement from the secular law in the society that it is living in. Rather, it seeks from the secular society and its laws the tools to allow Jews to be good Jews and the freedom to live that life without oppression or contempt. Unlike both Christianity and Islam, the Jewish tradition does not think that secular law ought to parallel Jewish law at all. Conduct can violate Jewish law and be permitted under the law of the nation Jews live in and conduct can be permitted according to Jewish law and be a violation of the law of the land. I think that the Jewish model wants government to insure that people are given the freedom to live their lives as they wish and see fit. It is enough that the law favors this, and if some use it to violate Jewish law, that is the freedom of conscious that the Jewish faith gives us all – even to be free to sin.

The Jewish tradition – with its strong religious idea that the law of the land is generally binding in commercial matters and more – lives comfortably in a society in which the government allows people to engage in private (or even public) conduct that the Jewish tradition might find repulsive. Secular law is not the source of religious morality in the Jewish tradition, but instead is a vehicle for enforcing peace and tranquility and allows all citizens to act in a way that is consistent with their faith without impacting others.There is another deeply important idea here. Of all the models of secular government that the Jewish tradition has encountered in its long journey in the diaspora – 2000 or more years --- none have proven as compatible with the Jewish tradition as those few where the government sought to be neutral on matters of theology and faith and religious practice. It was the 'Golden Age of Spain' for that reason and it might well be the golden age in America as well. Much as the Jewish tradition has deep and important religious values that it wishes people – frequently, Jew and non-Jew alike – would follow, history has taught the Jewish community that the American model of neutrality and agnosticism by the government on matter of faith, serves the Jewish community best.

Prof. Russell Sandberg on Law, Religion and Society

Russell Sandberg is Professor of Law at Cardiff University. His research interrogates the relationship between law and the humanities, with particular expertise in law and religion and legal history. He is the author of *Law and Religion* (Cambridge University Press, 2011), the first textbook in the field; *Religion, Law and Society* (Cambridge University Press, 2014), which explores the interplay between the legal and sociological study of religion; *Religion and Marriage Law: The Need for Reform* (Bristol University Press, 2021), which provides the first accessible guide to how contemporary marriage law interacts with religion, identifying pressure points and setting out proposals for reform and *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2021), which argues that history should be at the beating heart of the law curriculum.

He is the co-author of *Religion and Law in the United Kingdom* (Kluwer Law International, 2011; 2nd ed 2014; 3rd ed 2021) which forms part of the International Encyclopaedia of Laws Series. He has edited or co-edited *Law and Religion: New Horizons* (Peeters, 2010), *Religion and Legal Pluralism* (Ashgate, 2015), *The Confluence of Law and Religion* (Cambridge University Press, 2016), *Law and History: Critical Concepts in Law* (Routledge, 2017), *Law and Religion: Critical Concepts in Law* (Routledge, 2017) *Leading Works in Law and Religion* (Routledge, 2019) and *Research Handbook on Interdisciplinary Approaches to Law and Religion* (Edward Elgar, 2019). He is also the author or co-author of over 80 articles and book chapters addressed to legal, historical, sociological and general readerships. He is the editor or co-editor of four book series.

He is a Cardiff graduate, obtaining First Class Honours in his LLB in Law and Sociology in 2005 and a doctorate examining the relationship between religion, law and society in 2010. He served as Head of the Law department between 2016 and 2019. He is a contributor to The Conversation and Westlaw UK Insight and was a specialist Contributing Editor for Jowitt's Dictionary of English Law (Sweet & Maxwell 2010). His blog and personal website can be found at: https://sandbergrlaw.wordpress.com/Source: Cardiff University

The AAL Magazine: Professor, you are a distinguished legal scholar and the author of numerous books. Could you tell us a bit about why you became a legal academic?

Prof. Sandberg: Thanks. That's a great question. It's not a question that is often discussed. A lot of career sessions in Law Schools focus on becoming a solicitor or a barrister. Indeed, they go into the different types, different locales etc. But we rarely talk about why and how people become legal academics.

Talking about it is difficult because, by now, being a legal academic is as natural to me as breathing. And academic careers – perhaps all careers – are rarely the product of design. You can retrospectively identify a trajectory but in all likelihood it came about by happenstance. Being in a certain place, meeting particular people, studying specific things, saying yes to one invitation and no to another can all have significant often unforeseen and usually unexpected effects.

I suppose the starting point is to consider why I decided to study law in the first place. Thinking back I am not sure what the reason was! I definitely wanted to go to university in that it seemed the natural progression but also a massive step into the big city from my small close-knit valley community. I suppose I was drawn to a law degree because law was seen as a 'good' solid subject and also because it was something I could study alongside Sociology which I had enjoyed studying at A Level.

I realised that I was most engaged whenever we studied something that had a real life dimension. I never really understood the periodic table or trigonometry because they never really appeared on the TV or in everyday life! So, on reflection, I think studying law appealed because it involved studying real life: both in terms of the big issues of the day that appeared on the news animating the public discussion but also in terms of its impact on everyday life, the way in which law regulates every transaction and the key events in life in terms of family relationships, employment and so much more.

I also knew quite early on that I didn't want to go into practice, however. As my law degree progressed, I found myself increasingly absorbed in legal research and much less keen on applying the law found in textbooks to abstract problem questions. I particularly enjoyed modules on Legal History and on Law and Religion – and writing my undergraduate dissertation on the legal status of the civil service. I loved the research: the finding out of new things, chasing footnote references, making links. And I also really enjoyed the writing process: playing with words, trying to express things succinctly but accurately, presenting things in a new way, making new connections.

These experiences made it obvious what the next step would be – and thanks to generous financial support from Cardiff Law School, I began work on my PhD, which combined the two halves of my undergraduate degree - law and sociology – to explore the development of the new field of Law and Religion and how it compared with the Sociology of Religion. And I haven't stopped since! During the PhD I began teaching tutorials in criminal law as a part time tutor and then towards the end of the PhD, I was fortunate enough to obtain a lectureship in the Law School and following that over the years got promoted to Senior Lecturer, Reader and now Professor.

There has never been any grand plan in place. I have simply researched what I have found interesting and written things that I would like to read. In some respects, nothing has changed at all. If I look at what I am currently working on, it is clear to see echoes of my undergraduate degree interests.

The AAL Magazine: Iaw and religion is indeed a matter of great controversy. You have authored a book on *Law and Religion*published by the Cambridge University Press in 2011. Tell us what that discussed.

Prof. Sandberg: Well, although that book was written in about six months, the research it included went back years. In 2005 I began work on my PhD only to become distracted by other exciting

matters. The doctorate was to be a study of the interface between the Law on Religion and the Sociology of Religion. However, these two disciplines were in very different states. While the Sociology of Religion was an established field of study, Law and Religion was in a state of infancy. Moreover, it was in a state of flux. Both fields were being affected by changes which came to the fore post September 11th but this was more revolutionary and destabilising in relation to the legal study of religion.

During the years of my PhD research, tide after tide of new legislation and case law on religious matters not only added legal meat to topics but also brought the subject matter into the glare of the news agenda. This provided both a need to get my head around the likely effect of these significant changes but also was incredibly exciting. The land was moving under my feet and more often than not the legal earthquakes were attracting media and public interest. And there I was, free of any other commitments, with a front row seat watching and commenting.

So, during my PhD I published a number of short articles and the odd chapter exploring these legal developments. And I began to think that there was a need for a book to sum up the new legal framework. I received the contract for the book the day before my PhD viva. The plan was to extract the work I had done for and in the PhD about the development of the new legal framework into the tbook and then to reflect upon how to develop the PhD's argument about the need for a sociological approach to Law and Religion into a subsequent publication.

Telling the story of how the law had developed felt more pressing and was also becoming increasingly necessary for the purposes of teaching the Law and Religion module. The various articles written over the course of the PhD did not really add up to a coherent whole and so there were gaps on the reading lists. The plan was to quickly collate together my existing materials and notes to write the tbook before then paying attention to getting the PhD thesis into print. Half of the plan came into operation. From March 2010 to September 2010, I wrote the textbook. I wrote out of order so that I could do the most straightforward chapters while teaching. This led to quite a lot of notes about stuff I was referring to but had yet to write. The contents of the book had evolved during the process of putting together the proposal and evolved further during its writing. The speed in which I wrote meant that I paid little attention to the significance of the task. The absence of textbooks in the field meant that I was defining the sub-discipline. I was distilling the main topics, the canon and the approach.

Law and Religion expressed what I considered to be the core of the sub-discipline. The Religion Law / Religious Law distinction was expanded into the first chapter which also explored the growth of the field. This recognised that the question of defining a field was a means of inclusion or exclusion. However, I did not seek to explain or justify my own choices in terms of inclusion and exclusion. An initial conversation with the publishers led to the plan that the book was to be small and selective in the first edition and could then subsequently grow in coverage. To date, however, only one edition has been produced. Notwithstanding the intention to subsequently expand, the choice of topics in *Law and Religion* notably reflected my focus on what I called 'religion law' and within that fixated upon matters of religious freedom. Coverage was given to Church-State relations but almost as background early on and a penultimate chapter was devoted to religious law, which addressed questions of definition and status

and so examined the topic from a State-centric approach. The emphasis throughout was upon State law, providing a doctrinal account of how the legal framework affecting religion now stood.

The opening chapter on the development and various labels for Law and Religion studies was followed by a historical chapter which argued that the changes of recent years had witnessed a move towards the articulation of a positive right to religious freedom. That whistle-stop tour from 1066 to the current day was one of the last chapters to be written and the most enjoyable. Although there was some criticism of this act of periodisation in the chapter itself, this was something that over the years came to be a focus of the Law and Religion seminar we devoted to the topic. Through teaching this chapter I became increasingly convinced that it was an exercise in story-telling; a useful overview but one that needed to be questioned. A conviction hardened that such a critique could not take place until the conventional narrative had been told. A critical approach to law had to follow the conventional elucidation of law otherwise it would not be understood what was being criticised or subverted.

The next chapter looked at the different definitions of religion in differing legal contexts arguing that a move towards harmonisation could be identified. This was followed by a the one on Church and State relations, exploring the legal position of religious groups. This was followed by chapters on Article 9 and discrimination law which sought to describe the new laws on individual religious freedom with a detailed discussion of the case law and some coverage of exceptions for religious groups. This was followed by two chapters that looked at discrete interactions between religion and areas of law, criminal law and education. These provided the heart of the book but its subject-matter was telling. The chapters deliberately did not refer to other areas of law: so, for instance, the one on religion and criminal law was entitled 'religious offences'. Rather, the intent was to demarcate the main contours of religion law. This meant that there was no room for discussion of religion under charity law, employment law or family law. Instead, the focus was on particular laws that dealt explicitly with religious rights.

I remember a colleague at the time suggesting that the book might have been better titled religious rights. I dismissed this at the time on the basis that the field had become known as Law and Religion. However, in so doing I made the error of conflating the field with the selective and limited coverage given in my book. The benefit of hindsight shows that at the very least I was operating under a 'religious rights' driven understanding of my subject matter. This would not have happened had I been writing – and perhaps if I had been educated – a decade before. The lens through which I saw the subject was shaped and constrained by the new laws on religion and their rights-based nature. This was underlined by the sole chapter on religious law and a substantial concluding chapter discussing emerging trends and pressure points.

The AAL Magazine: How did you follow this up in your next book *on Religion, Law and Society*, published by Cambridge University Press in 2014?

Prof. Sandberg: In the academic year 2012-13 I returned to the long-postponed task of converting the PhD (now minus the account of the development of Law and Religion that had provided the core of the first book) into a monograph. I was given study leave to

write this and basically spent the year writing the PhD I would have written had I started again at the end of the viva. This was where I explored at length the need for a sociological approach to Law and Religion.

A chunk of chapter one of *Religion, Law and Society* featured material from the PhD thesis where I explored the development of Law and Religion studies and the Sociology of Religion before exploring the interdisciplinary literature to date in each sub-discipline. This came after an extended opening sequence which explored the novelty and limitations of the new legal framework on religion developing the idea of the juridification of religion which had been mentioned in the final chapter of the first book. The chapter began by using the House of Lords decision in *Begum* (concerning wearing religious dress in schools) as a case study of the new approach presented provocatively as denoting the death of religious freedom. The chapter closed with a detailed case study from the PhD on the definition of religion showing that lawyers and sociologists shared similar problems in defining religion and that legal definitions of religion had sociological affects meaning that both disciplinary perspectives were necessary. This unusual structure reflected my conviction that both legal and sociological analysis was needed in detail before talk of an interdisciplinary analysis could truly begin.

Chapters two to five then tested my hypothesis that a sociological approach was necessary by reference to the secularisation thesis, a topic that had been a few pages long at most in the original PhD. Here, the secularisation thesis was explored and questioned by juxtaposing sociological and legal materials and by exploring how legal change reflected or refuted the sociological theory. The resulting analysis put forward an explanation of how the relationship between religion and society had developed in the late twentieth century and how this had paved the way for the tensions of the twenty-first century which were both the cause and also a context for the new and ineffective legal framework. Chapter five, however, ended on a positive note, looking at the then recently delivered Strasbourg decision on *Eweida* (about the wearing of religious symbols in the workplace) it was argued that this judgment had the potential to correct many of the misunderstandings and restrictions found in the domestic case law. As the opening sentence of chapter six put it, this decision allowed for religious freedom to be reborn. These chapters contained much more sociological analysis than had been in the PhD thesis but they also included – mostly within the case studies – detailed doctrinal analysis. The argument that both legal and sociological approaches to religion could complement one another was illustrated by showing how they worked separately and how this could complement each other.

The sixth and final chapter of *Religion, Law and Society* is the most important part of the book and, unfortunately, placing the argument there and not repeating it in a more accessible place has meant that the argument has not really been heard. In some respects the chapter provided a revised version of the conclusion to the PhD. It explored the argument that the Sociology of

Law had a role to play in bringing work on religion from the two disciplines of Law and Sociology together and enabling a meaningful analysis to take place. However, I was critical of the way in which the Sociology of Law had been regarded as a specialism and so its ideas, concepts and methods had remained the preserve of a select few.

It struck me that I had been unaware of the Sociology of Law until fairly late on in my PhD. My degree in Law and Sociology had never required the two to meet. So in chapter six I developed an argument that was the exact reverse to the argument I had spent years developing in relation to Law and Religion. Whereas I had made a career of arguing that Law and Religion ought to be seen as a sub-discipline in its own right, I now argued that the Sociology of Law ought not to be a sub-discipline since that meant that its insights were being limited to specialists rather than being part of the toolkit of all academic lawyers, to be used whenever they were exploring the social context of Law. And in four pages towards the end of the chapter, I tentatively applied this argument to historical approaches to Law too.

However, chapter six was also insistent about the value of doctrinal study. It dismissed frequent assertion that a Law degree does not teach methodology by exploring how the development of doctrinal legal skills constituted a methodology. Chapter six argued that an interdisciplinary approach to Law needed to build upon rather than replace this doctrinal analysis.

The AAL Magazine: How did your research develop from there?

Prof. Sandberg: Chapter six of the second book left a mark on me personally and made me question where I wanted to go next intellectually. It made me crave a deeper form of analysis than continuing to map the legal framework on religion. This was also motivated by a realisation that much of what I had written on this was already outdated. My original thought was to develop the sociological approach of Religion, Law and Society and to move from the general to the particular and instead of talking about sociological theory as a whole to talk and apply particular a sociological theory. I alighted on a theory which I had mentioned in the monograph but had never come across in my studies: the social systems theory of NiklasLuhmann. My research on Luhmann provoked more general questions about the nature of law, its autonomy and its interaction with society and how law and religion could be seen as two social systems and how their interaction needed to be analysed: how law understood religion how religion understood law. I began to feel that the prevailing focus in Law and Religion scholarship was too State-centric and too legalistic. I began to wonder if the criticisms I had made of the Sociology of Law and of Legal History could also be made of Law and Religion and whether I had unwittingly helped to create the very situation that I was being critical of.

I alwo began teaching legal history at this time and history has come to fore in my recent work, exploring the need for a historical approach to Law and to understanding this as part of an interdisciplinary approach to Law. Those four pages on this in the concluding chapter of *Religion, Law and Society* had sown the seeds for this. I explored this in detail in my book

on Subversive Legal History, published by Routledge in 2021. There I argued that legal history needs to be seen as a method that all legal writers and students can use. History is often used to stabilize the law. However, I argue that it can be used to challenge it, to subvert it. Reference to history shows that other ways of doing things are possible because other ways have been used in the past.

I haven't completely turned my back on Law and Religion, however. I still write pieces that reflect upon developments. My recent short book, *Religion and Marriage Law: The Need for Reform* was published by Bristol University Press last year and examines how English and Welsh laws on marriage are out of date. They only recognize particular types of religious marriages – typically those which take place in a registered place of worship – which discriminates against religions who have a tradition of couples being married elsewhere. There is also no recognition of marriages conducted by belief organizations such as the Humanists and by independent celebrants. My book argues that this needs to change and explores how the law could be reformed.

The AAL Magazine: What are you working on at the moment?

Prof. Sandberg: well, there are a few things at various stages of development. I have just finished a short book for Anthem Press on religion and education law, looking at the historical development of the law in England and Wales and how the law in Wales has recently been changed. I am also working on a book for Cambridge University Press which provides a historical introduction to English law, focusing on the origins of the common law.

Besides that, there are a number of things at the planning stages. I have a couple of books to write for Edward Elgar which will see me return to the topic of Law and Religion more generally and reflect on what I have learnt since the publication of my previous books on the topic. Law and Religion is over ten years old and so it seems timely to revisit that and to see what that would look like now. So, one book is on the law relating to freedom of religion. The other examines the development and fiture of the field of Law and Religion studies; it brings together my work of NiklasLuhmann and what I have learnt from the *Subversive Legal History* book too. It's a follow-yup effectively to *Religion, Law and Society*. So, things are basically coming together full circle! But, at the same time, there's some other stuff I'm developing that opens up further new doors. I can't really talk about them yet – some of them might not happen! But it involves interrogating further the relationship between law and the humanities and opening up new areas of study.

The Anglo-American
LAWYER
MAGAZINE

SPECIAL MESSAGE TO THE PRESIDENT

OF THE UNITED STATES OF AMERICA JOE BIDEN

Dear Mr. President,

The invention of hypersonic missiles by the perceived enemies of the United States would be a huge national security concern. The speed with which they are delivered will wreak havoc resulting in breaking the constitutional order of the United States which it had cherished for two centuries. The attack on the U.S. satellite communication facilities in space could be the first strike option against the U.S. It could cut off the President of the U.S from the Nation, from the Military Commanders and the civil government as a result you will not be able to communicate with U.S allies in Europe/ NATO, Israel, Japan, India, Australia, New Zealand, and elsewhere. Your position as Commander-In-Chief of the U.S forces would be meaningless if you are unable to communicate with the Nation. The key allies of the U.S., would lose confidence in your ability to wage a coordinated battle against the perceived enemies. The authoritarian regimes in the world would feel triumphant and forge new strategic alliances.

We, *The Anglo-American Lawyer* Magazine, call upon you to immediately appoint a Presidential Commission to inquire into the efficacy of the U.S constitution and whether it should be suitably revised or amended to deal with the new threats. This will ensure that the security of the strategic allies of the U.S too is guaranteed in case such an eventuality takes place.

God Bless America

OVER TO YOU MR. PRESIDENT

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